Attachment 2:
Written Testimony of the California Regional Water Quality Control Board,
San Diego Region
In Opposition to the Request for Stay
Of the
Orange County Municipal Storm Water Permit Order No. R9-2002-0001
June 27, 2002

List of Witnesses to be called by the California Regional Water Quality Control Board, San Diego Region in Opposition to the Request for a Stay of Requirements of Order R9-2002-0001

1. David W. Gibson, Environmental Scientist, San Diego Regional Water Quality Control Board.
2. Jeremy Haas, Environmental Scientist, San Diego Regional Water Quality Control Board

Written Testimony of
California Regional Water Quality Control Board
San Diego Region

Hearing on Petition for Stay Filed by the
City of Aliso Viejo, the City of Mission Viejo, and the Golden Rain Foundation

July 2, 2002

On January 9, 2002, the San Diego Regional Water Quality Control Board (SDRWQCB or Regional Board) held a hearing on the renewal of the Municipal Storm Water NPDES permit for the portion of Orange County within the SDRWQCB jurisdiction. On February 13, 2002, the SDRWQCB adopted the permit. This permit (Regional Board Order No. R9-2002-01) was the third version of the MS4 NPDES permit in a twelve-year period. Previous versions were issued in 1990 (Order No. 90-38) and 1996 (Order No. 96-03). The City of Aliso Viejo, the City of Mission Viejo, and the Golden Rain Foundation (Stay Proponents) seek review of the permit by the State Water Resources Control Board (SWRCB) and, in advance of that hearing and decision, the adoption of a stay to prevent the terms of the permit from taking effect. The Regional Board objects to the issuance of a stay.

The burden lies with the Stay Proponents to prove the three elements necessary for a stay. The SDRWQCB submits that, collectively and individually, the Stay Proponents have failed to adequately allege facts or produce proof to justify granting their requests for a stay of the permit requirements. Although the SWRCB is not considering the merits of the petitions to review Order R9-2002-0001 at this time, the manner in which certain of the Stay Proponents have petitioned the SWRCB for a stay of the permit requirements renders it is necessary for the SDRWQCB to address such merits where they provide context for the stay request.

I. HARM TO THE PUBLIC INTEREST IF THE PETITION IS GRANTED

There is no question that urban runoff and storm water adversely affects the waters of the State of California and in southern Orange County. In fact, the Stay Proponents do not challenge the underlying permit findings, which describe the impact upon water quality and beneficial uses resulting from the discharge of polluted urban runoff discharges. Furthermore, the Stay Proponents have not challenged the SDRWQCB's assessment of economic and social impacts resulting from the discharge of polluted urban runoff in the San Diego Region discussed in section III of the permit's Fact Sheet/Technical Report. These findings and assessment have not been factually challenged in their stay requests and demonstrate the continued harm to interested persons and the public interest if a stay is granted. The SDRWQCB submits that on this test alone, the Stay Proponents petitions are flawed and the stay requests should be denied by the SWRCB based on this fundamental fact.

As described in the Fact Sheet/Technical Report (Fact Sheet) to the permit, the administrative record is replete with detailed information that documents the extent and serious nature of the urban runoff problem. Together, these sources of data and subsequent analyses indicate that dry weather runoff and storm water (urban runoff) in southern Orange County are impairing water quality and that additional or improved management efforts are vital to improving beneficial uses. Below are some of the data the SDRWQCB submits is evidence of this impairment to beneficial uses and human health:

- Beach Closures: A number of the beach postings in southern Orange County, including locations in Dana Point, Aliso Beach, and others are attributed to pollution from urban runoff. Beaches are posted and can be closed when bacteria levels indicate a potential health risk to humans. Coastal economies suffer when people decrease their time spent at beaches due to beach closings or fear of coastal water pollution.

Copermittees understand the connection between urban runoff pollution and beach impairments. Several of the coastal Copermittees have implemented or are proposing dry-weather diversions that route urban runoff in streams or storm drain outfalls to sewer lines in an attempt to keep pollution contained in urban runoff from impacting beaches. The following table, adapted from the 2001 Orange County Grand Jury report "The Urban Runoff Battle: Ready, Fire, Aim!" and based on data obtained from the Orange County Health Care Agency, lists the number of beach postings at South Orange County Beaches in 2000.

South Orange County Beach Postings in 2000*

Posting Location	Number of Postings	Total Days Posted	Posting Location	Number of Postings	Total Days Posted
Crystal Cove State Park	9	23	Doheny State Beach Park	9	315
Laguna Beach	32	77	Capistrano County Beach	6	248
Aliso Beach	13	23	Capistrano Bay District	7	107
Monarch Beach	5	49	Poche Beach	5	163
Salt Creek Beach	3	4	San Clemente City Beach	8	20
Dana Point Harbor	12	739**	San Clemente State Beach	1	3

* Adapted from the 2001 Grand Jury report "The Urban Runoff Battle: Ready, Fire, Aim!" and based on data obtained from the Orange County Health Care Agency.
** includes 2 long term postings totaling 569 days

- NPDES Stormwater Sampling: Monitoring of urban runoff in the San Diego region in the 1999/2000 reporting period showed California Toxics Rule exceedances of acute metals at

the point of discharge to receiving waters in 94% of reported samples. From 1992 to 2000 the Copermittees report estimated mean concentration (EMC) data for only one stream in southern Orange County, Oso Creek. There are no discernible trends over time in the Oso Creek EMC data. There were no assessments for 1997, 1998, and 2000. At best, the data show a lack of water quality improvement, implying that the DAMP is not having a positive effect on EMC parameters in Oso Creek. This data source also indicates that there is poor representation of south county receiving waters in the current countywide monitoring program, and calls attention to the need for immediate improvements in order to better assess BMP effectiveness.

- Aliso Creek 205(J) Bacteria Investigations: Bacteriological sampling demonstrated that high levels of Total and Fecal Coliform and Enterococcus bacteria were common in the Aliso Creek watershed. Contact (REC-1) and Non-Contact Water Recreation (REC-2) standards were exceeded at all monitored stations except the uppermost. For example, three sampling locations on tributaries to Aliso Creek had *E. coli* averages over 2,000 MPN/100ml and two sampling locations on the main stem of Aliso Creek had average fecal coliform or *E. coli* averages greater than 2,000 MPN/100ml during the study period. In addition, toxicity was shown to be prevalent in storm water flows throughout the watershed. In 1999, the SDRWQCB issued a Cleanup and Abatement Order No. 99-211 to the County of Orange, the Orange County Flood Control District and the City of Laguna Niguel for high coliform bacteria levels in the JO3PO2 storm drain outfall to Sulphur Creek, a tributary of Aliso Creek. However, the Copermittees in the Aliso Creek watershed failed to revise, develop, or implement a substantially improved urban runoff management program in response to the 205(j) study results to address these water quality problems and no water quality improvement was demonstrated. As a result, in March 2001, the Regional Board issued an enforcement action pursuant to Water Code Section 13225 for an Investigation of Urban Runoff in the Aliso Creek Watershed.

- U.S. Army Corps of Engineers (USACE) San Juan Creek Watershed Study: The USACE San Juan Creek Watershed Management Feasibility Study identifies high Fecal Coliform bacteria counts measured at the lowermost end of San Juan Creek as the greatest water quality concern in the watershed. The USACE analysis of water quality data from 1992-1995 further showed moderate contamination in San Juan Creek, Trabuco Creek, and Oso Creek. Their survey of historical data indicated that lead levels have dropped, copper levels have increased, and spikes of chromium and nitrates occur. The Feasibility Study concludes that "Water quality in the San Juan creek watershed area is primarily influenced by nonpoint source stormwater runoff primarily from urban and residential areas." (P.E44, SEC. 4.4.2.1).

- U.S. Army Corps of Engineers Aliso Creek Watershed Study: In the USACE environmental evaluation for Aliso Creek watershed water quality, pollution concerns include runoff of pesticides and herbicides in areas near the creek. Non-point source pollution is attributed to an increase in urban developments and the associated storm water runoff. The study concludes that "[d]ue to the increase in development in the upper regions of the Aliso Creek watershed, stormwater runoff is likely the most prominent on-going factor causing deterioration of water quality." (P.E40, SEC. 4.4.1.1).

- Grand Jury Findings: The 1999-2000 Grand Jury investigating "The Rainy Season's 'First Flush' Hits the Harbors of Orange County," found that in spite of the County's strong emphasis on public education as required by the DAMP, a significant amount of trash finds its way into the County-maintained flood control channels and County-maintained storm drains, rather than being disposed of properly. In "The Urban Runoff Battle: Ready, Fire, Aim!" the 2001 Grand Jury examined beach advisory postings and concluded that since the total number of postings is nearly identical in 1999 and 2000, "virtually no improvement has occurred."

These independent investigations of the southern Orange County watersheds all draw the similar conclusion that urban runoff and stormwater are degrading water quality. Moreover, all of the above-referenced reports were produced during the second-term MS4 Permit of the Copermittees. This establishes that the MS4 program had been fully developed by the Copermittees and demonstrates both the ineffectiveness of the DAMP and the need for a stronger third-term permit. The Stay Proponents are, therefore, risking substantial harm to the public interest by delaying implementation of the third-term MS4 permit.

Nonetheless, the Stay Proponents claim that a stay is acceptable because they will be implementing the DAMP in the interim. Simply stated, the DAMP is not effective in reducing pollutants in MS4 discharges to the Maximum Extent Practicable. The SDRWQCB has made this determination[1] and received public testimony during the January 9, 2002 hearing reiterating the point[2]. Each day the third-term permit is stayed would result in inexcusable and substantial harm to the public interest.

II. THE STAY PROPONENTS WILL NOT INCUR SUBSTANTIAL HARM IF THE STAY IS NOT GRANTED

Most arguments raised by the Stay Proponents are based on increased costs over previous program expenses and potential failure to comply as evidence of substantial harm if a stay is not granted. Compliance during the petition review is fiscally and practically achievable, as demonstrated by the performance of the San Diego MS4 Copermittees under essentially the same requirements, and that the costs are primarily associated with implementation of management measures that would not generally be required until after petitions are expected to be heard. Moreover, previous permits broadly required many of the management measures for which the Stay Proponents seek a stay. As a result, none of the Stay Proponents offer convincing or

[1] See attachment 5 to the Fact Sheet/Technical Report for Regional Board Order R9-2002-01 for an analysis of the DAMP. Also, on March 2, 2001, in issuing a Directive Pursuant to CWC 13225 for an Investigation of Urban Runoff in the Aliso Creek Watershed, the SDRWQCB concluded that the proposed 2000 DAMP would be inadequate to serve as a foundation for a program to correct the impairment of Aliso Creek.

[2] At the January 9, 2002 hearing for R9-2002-01, the SDRWQCB received comments from the Natural Resources Defense Council that a review by Dr. Richard Horner determined the DAMP was "…wholly inadequate to stem the diminishment of water quality and aquatic ecosystems associated with the growth of population and its support structure in Orange County." Dr. Horner subsequently reiterated this conclusion in person at the June 12, 2002 SDRWQCB hearing on the model SUSMP for the San Diego County MS4 copermittees.

supportable arguments for substantial harm if a stay is not granted for the interim time until petitions are heard.

The three Stay Proponents' offer independent arguments, but share some concerns. This written testimony will address (1) specific concerns of the City of Aliso Viejo; (2) the concerns shared by the Cities of Aliso Viejo and Mission Viejo; and (3) the petition submitted by the Golden Rain Foundation.

Response To The City Of Aliso Viejo

Toxicity Finding

Aliso Viejo has failed to adequately satisfy all three of the criteria regarding Finding 26 of the permit and erroneously applies the MEP standard to a Finding of Fact regarding the San Diego Water Quality Control Plan (Basin Plan).

At issue is a Finding of Fact that the Basin Plan provides that "all waters shall be free of toxic substances in concentrations that are toxic to, or that produce detrimental physiological responses in human, plant, animal or aquatic life…" The Basin Plan must be implemented in permits adopted by the SDRWQCB. As discussed in great detail in the Fact Sheet and Response to Comments Document, Receiving Water Limitations (water quality objectives adopted by the SDRWQCB in its Basin Plan) are not subject to the MEP standard, but are expected to be complied with under the Order through the iterative implementation of more stringent BMPs. As a Finding of Fact regarding the Basin Plan requirements for receiving waters, the Finding is not itself subject to the MEP standard nor is it a permit directive. Thus, it cannot be "stayed" without in effect staying the Basin Plan provision. The Copermittees are expected to seek a return to compliance through the iterative process described in the Administrative Record and SWRCB Orders WQ 98-01, WQ 99-05, WQ 2000-11 and WQ 2001-15. Thus there is no question of law or fact associated with the Finding.

Moreover, Aliso Viejo actually seems to make the case for inclusion of the Finding and achieving compliance through implementation of certain permit requirements that it simultaneously finds objectionable when it states "These (permit) protections will themselves reduce the presence of toxic substances in concentrations that are toxic to, or that produce detrimental physiologic responses in human, plant, animal, or aquatic life." That very statement contradicts the other statements that the standard is not achievable and that there is a lack of substantial harm to interested persons or the public interest if the stay is granted. Thus, the case made previously for substantial harm to interested persons or the public interest if the stay request is granted is confirmed and denial of the stay requested for Finding 26 will not result in substantial harm to the Stay Proponent.

Finally, the case for establishing the toxicity standard cited in Finding 26 was made in the adoption of that standard in the Basin Plan by the SDRWQCB. As dischargers of urban runoff that contains waste, the Copermittees are required to ensure that their discharges do not violate Basin Plan water quality standards. Thus the potential costs and ability to comply with the standard are not a permit issue, but rather a Basin Plan issue.

Response To The City Of Aliso Viejo And City Of Mission Viejo

Commercial and Industrial Land Use Programs are Not Unreasonable and Will Not Result in a Shift of Oversight Responsibility from the State to the Cities

Both Aliso Viejo and Mission Viejo argue that Permit Sections F.3.b. and F.3.c improperly transfer oversight responsibility from the State to the City and that the cities lack the funds for developing and implementing a commercial and industrial program. Mission Viejo argues that the permit's requirements to develop an industrial and commercial activity database, to develop an inspection program, and to inspect sites this year should be stayed essentially because the City does not have enough time to meet the permit's deadlines and will incur substantial costs in attempting to do so.

The Stay Proponents have not provided adequate evidence of substantial question of law or fact with regard to the inspection requirements for industrial and commercial facilities and construction sites. Rather, the Stay Proponents have merely asserted that the requirements are "legally questionable" and have not provided conflicting case law or guidance from the Courts, USEPA or SWRCB on this issue.

The Stay Proponent arguments regarding the requirement for the Copermittees to reduce pollutants in runoff from commercial and industrial sites and to determine compliance with storm water ordinances at these facilities ignores the fundamental fact that these were requirements of the DAMP in previous permits Order No. 90-38 (section VI.A.3)[3] and Order No. 96-03 (section V.11.a)[4] As documented in the Administrative Record, the adoption of these requirements in the previous Orders and in Order No. R9-2002-0001 is consistent with the SDRWQCB's authority under the Clean Water Act, Federal NPDES Storm Water Regulations, and Porter-Cologne Water Quality Control Act. In fact, Mission Viejo attempts to appease concerns of a stay request by noting the DAMP will be implemented during the stay period. Assuming full implementation of the DAMP, a requirement made of newly incorporated Cities, both Stay Proponents should already have an inspection and compliance assurance program in place for commercial and industrial facilities that could be readily adapted to the more specific requirements of Order No. R9-2002-0001.

It is further worth noting that the permit requirements at issue only call for the inventory and prioritization of commercial facilities and subsequently, inspections of high priority commercial facilities *as needed*. The Stay Proponents seem to assert that all high priority facilities will have to be inspected and establish their costs accordingly, but the permit does not in fact require such inspections beyond those that the Copermittees determine are needed.

[3] Order No. 90-38 required the Copermittees to prepare and implement a Drainage Area Management Plan that was to include "implementation plans for site-specific BMPs which are required to reduce pollutants in the stormwater discharges from residential, commercial and industrial areas and construction sites."

[4] Order No. 96-03 required the implementation of the DAMP developed under Order No. 90-38 as an enforceable component of the Order. Included in Order was a requirement to develop a "mechanism to determine compliance of industrial facilities, commercial facilities and construction sites with storm water ordinances and concerns."

Furthermore, contrary to the Stay Proponents' assertions in support of their stay requests, the permit does not intend or effect the transfer of SDRWQCB authority for inspections or enforcement of the General Statewide Industrial Permit. In fact, the Stay Proponents confirm that the SDRWQCB performs inspections and enforcement actions at facilities covered under these permits when asserting that relief from enforcement of its local ordinances would not impact the public interest or other parties. Furthermore, the Stay Proponents are not required to evaluate Storm Water Pollution Prevention Plans beyond *compliance with its ordinances* and only in cases in which they determine to establish a biannual inspection frequency for a particular facility.

As discussed in extensive detail in the Fact Sheet and the Response to Comments Document, the dual regulation of industrial and construction sites was the stated intent of the USEPA in its Federal NPDES Storm Water Regulations. Local governments have the primary regulatory authority over the majority of construction and industrial sites since they issue the development and land use permits for the sites. By virtue of their closer relationship and proximity, localized site regulation and enforcement efforts enable the Copermittees to more effectively control site discharges into their MS4s, the discharge from which they are ultimately responsible. Contrary to Stay Proponents' contention, therefore, a denial of their stay request for the requirement to assess compliance through inspections of industrial and commercial facilities will not cause harm to the Stay Proponents. As stated previously, granting the stay request will result in substantial harm to interested persons and the public interest. Thus the Stay Proponent's request fails all three of the criteria necessary to grant a stay of the permit requirements.

Finally, the SDRWQCB considered the costs associated with the implementation of the inspection requirements in the context of the water quality, social and economic impacts in southern Orange County. Several Copermittees submitted extensive comments regarding the potential costs of the requirements of the Tentative Order which were considered by the SDRWQCB prior to its adoption of the permit.

Construction Inspection Program is Not Unreasonable and Will Not Result in a Shift of Oversight Responsibility from the State to the Cities

Aliso Viejo and Mission Viejo both argue for a stay of the requirements regarding inspection of construction sites (Permit Section F.2) because the cities lack the funds necessary to implement a program, and the regional boards are responsible for oversight of the General Statewide Construction Permit (SWRCB Order 99-08 DWQ).

As with requirements regarding developing industrial and commercial inspection programs, the Stay Proponents' arguments regarding the requirement for the Copermittees to reduce pollutants in runoff from construction sites and to determine compliance with storm water ordinances at these facilities ignore the fundamental fact that these were requirements of the DAMP in previous permits Order No. 90-38 (section VI.A.3)[3] and Order No. 96-03 (section V.11.a).[4]

Again, contrary to the Stay Proponents' assertions, the permit does not intend or effect the transfer of RWQCB authority for inspections or enforcement of the General Statewide Construction Permit. As discussed in extensive detail in the Fact Sheet and the Response to Comments Document, the dual regulation of industrial and construction sites was the stated intent of the USEPA in its Federal NPDES Storm Water Regulations[5]. Furthermore, a stay of a construction inspection program would cause substantial harm to interested persons or the public interest because in enforcing the General Statewide Construction Permit, the Regional Board is currently limited to regulating only construction sites over 5 acres in size and is not able to effect the same level of local control over the sites that local authorities should be able to muster to control the discharge of pollutants from these sites into their MS4 to the MEP.

As further evidence of the misunderstanding or deliberate misinterpretation of the permit, the Stay Proponents have one year to put the new inspection *frequencies* into effect, by which time the petition review should be complete. Section G of the permit clearly states that the Copermittees have 365 days to fully implement the permit, and that the DAMP shall be implemented in the interim. Assuming full implementation of the DAMP, a requirement of newly incorporated Cities, both Stay Proponents should already have an inspection and compliance assurance program in place for construction facilities that could be readily adapted to the more specific requirements of Order No. R9-2002-0001. Aliso Viejo seems to indicate that this is the case, but Mission Viejo's petition leaves its compliance with the DAMP in doubt.

Furthermore, costs presented by Aliso Viejo assume a five-acre threshold, but under terms of the permit, five-acre sites are not necessarily required to be inspected with high-priority frequencies. Only sites over 50 acres would necessarily be high priority sites that demand increased inspection frequencies over the current program. Other high priority criteria may not be applicable to the City because receiving waters in the area are not listed as impaired for sediment, and sites may not be discharging directly into environmentally sensitive areas. Aliso Viejo, therefore, has based its claim of harm on suspect assumptions.
Thus, the Stay Proponents have not demonstrated that they will be substantially harmed if the stay is denied and have failed to establish that there is in fact a question of law or fact on this matter. As previously stated, the SDRWQCB asserts that there will be substantial harm to interested persons and the public interest if the stay is granted and thus the stay requests from Stay Proponents' petitions fail to satisfy all three criteria necessary to grant a stay on this matter.

Response To The City Of Mission Viejo

[5] U.S. Environmental Protection Agency. 2000. Storm Water Phase II Compliance Assistance Guide. EPA 833-R-00-002. In its guidance for the Phase II regulations, US EPA supports increased municipality responsibility, stating "Even though all construction sites that disturb more than one acre are covered nationally by an NPDES storm water permit, the construction site runoff control minimum measure for the small MS4 program is needed to induce more localized site regulation and enforcement efforts, and to enable operators of regulated small MS4s to more effectively control construction site discharges into their MS4s. While these above citations refer to small municipalities under Phase II of the NPDES program, US EPA recommendations to small municipalities are applicable to larger municipalities such as the Copermittees, due to the typically more serious water quality concerns attributed to such larger municipalities.

While the City of Aliso Viejo request for a stay is limited to just four items (toxicity finding, inspections of construction, industrial, and commercial sites), the City of Mission Viejo raises additional issues in support of its contention that the City and the public will be substantially harmed if a stay is not granted. The City of Mission Viejo seeks a stay for ten specific provisions that it will have to implement during the petition review period. The City will not suffer substantial harm during the review period by moving forward with these provisions. The City also raises as a question of law several other provisions based on the intent of the SWRCB to address in pending appeals. Although the SWRCB intends to address these requirements in other MS4 permits, these issues do not present substantial questions of law or fact because they have previously been addressed by the SWRCB or are within the authority granted by the Clean Water Act.

Notably, in Mission Viejo's petition, the three SWRCB criteria for a stay are not applied specifically to each contention, but are generally implied to relate to several contested permit sections. The claim of substantial harm is based upon the premise that the city lacks a readily available source of new revenue to fund the program and that the City would risk exposure to liabilities if the Permit is modified by the SWRCB. Both of these arguments are specious at best and reflect a poor historical commitment to addressing the sources of pollutants urban runoff and the impact of those pollutants on the beneficial uses of receiving waters. In the end, the claims fail to meet the burden of proof necessary to grant a stay of those permit requirements.

The MS4 Program's Cost is Not Unreasonable

The crux of Mission Viejo's stay arguments is that the City lacks financial resources to develop, submit and implement the required Jurisdictional Urban Runoff Management Program. In support for a stay, the City submits cost estimates largely based upon estimates provided by the Principal Permittee. In doing so, the City acknowledges its reliance upon model templates developed for the entire county, including areas under jurisdiction of the Santa Ana Regional Board. Mission Viejo argues that new programs are complex and that consultants must be retained to customize the templates, which will not be ready until November 2002. As a result, the City continues, a "premium price" will have to be paid to the consultants in order to complete a JURMP based on the templates prepared by the County.

First of all, the City is not obligated in the permit to wait for or rely upon templates developed by the County of Orange to address permit requirements from two Regional Boards. It is likely the templates produced by the County will be equivalent to models used by the County of San Diego that were submitted to the SDRWQCB in February 2002 and which *have been available to the City of Mission Viejo since that time*. Moreover, the City fails to acknowledge that the San Diego Copermittees, acting under essentially the same permit requirements, were able to satisfactorily comply with those requirements. In addition, many of these JURMP requirements have been elements of the current DAMP, which, as discussed above, the City is *already obligated* to implement. A stay of the development of the JURMP is not warranted based on Mission Viejo's disingenuous argument that it will incur substantial harm from forcing a consultant to develop a program in three months at great cost based on a template developed to address requirements of the San Diego and Santa Ana Regional Boards.

Furthermore, in its cost estimate argument, the City seems to demonstrate that it has thus far failed to meet the requirements of Order No. 96-03, the DAMP, and Federal regulations. This serves to inflate the appearance of a substantial increase in required program funds, and, in fact, exhibits that the City has under-funded its current program by not implementing required elements. For instance, the City claims that it needs to develop a construction program and lacks the legal authority to inspect construction sites. Regarding municipal inspections of construction sites, federal NPDES regulation 40 CFR 122.26(d)(2)(iv)(D)(3) provides that municipal storm water programs include "A description of procedures for identifying priorities for **inspecting sites and enforcing control measures which consider the nature of the construction activity**, topography, and the characteristics of soils and receiving water quality" (emphasis added). As noted earlier, Order 96-03 (Section V.11.a) addressed this by requiring that the City develop a mechanism to determine compliance of construction sites with storm water ordinances and concerns. Further, Order 96-03 (Section V.12) requires the City to develop a training program for staff of construction inspection programs, and requires the permittees (Section V.13) to provide notification to the Regional Board regarding information collected during construction inspections of sites regulated by the Statewide General Permit. As a result, either the City failed to meet the second-term permit requirements for a construction program or intends to budget money to develop another one based on a template provided by the County. In either case, the City's position that it lacks resources to implement the construction element of the new permit is clearly a result of poor historical commitment to its urban runoff management obligations and not a reasonable argument that it will sustain substantial harm if a stay is not granted.

Most of the cost figures supplied by the Stay Proponent actually refer to implementation of the JURMP. As noted earlier, the City demonstrates a misinterpretation of the Permit's requirements (e.g., claiming inspections under revised schedules must be completed by April 2002), which undermines the credibility of cost estimates. Further, increased costs by themselves do not constitute substantial harm in the context of more stringent permit requirements under the NPDES program and the iterative process established in the State Board Orders. The degradation of water quality over the last two permits clearly suggests improvements in the local programs would be necessary and that additional resources would need to be provided. As described above and below, however, Mission Viejo, has not provided facts and proof of substantial harm or substantial questions of law or fact regarding implementation of the JURMP. As stated above, the SDRWQCB contends that there will be substantial harm to interested persons and the public interest if a stay is granted. Thus Mission Viejo's stay request fails all three tests and a stay on these requirements is not warranted.

Program Requirements That Have To Implemented During The Petition Review Period

Mission Viejo's stay request of specific permit elements concerns items claimed to be infeasible or inappropriate during the first year of the permit term. The City claims these actions are either expensive and/or may be unnecessary if the SWRCB modifies the terms of the permit. For these items, however, the City again fails to adequately satisfy the three criteria for a stay necessary to justify its stay request. Several of these items, including the requirements for construction,

industrial, and commercial program development and inspections were previously addressed in the response to both Aliso Viejo and Mission Viejo and will not be repeated.

Develop a Model SUSMP and Aspects Of SUSMP Requirements That Are Alleged To Be In Variance With SWRCB Order 2000-11

Mission Viejo requests a stay of the entire requirement without showing it will incur substantial harm from developing elements of the model SUSMP (Section F.1.b.2). The permit requires that the Copermittees develop and submit a model Standard Urban Stormwater Mitigation Plan (SUSMP) within 365 days, and then each implement the SUSMP in another 180 days. Nonetheless, requesting a stay of SUSMP requirements fails to satisfy the test that substantial question of law or fact exists on this matter because the SWRCB has already previously ruled in precendential Orders on the appropriateness of SUSMPs. State Board Order No. 2000-11 finds that SUSMP requirements reflect a reasonable interpretation of development controls that achieve reduction of pollutants in storm water discharges to the maximum extent practicable, and this was upheld in State Board Order 2001-15 during its review of the San Diego MS4 permit, from which SUSMP requirements in the Orange County permit were derived. Moreover, modifications to the SUSMP provisions in the Orange County MS4 permit took the SWRCB's direction into account. As previously stated, substantial harm to interested persons and the public interest will result if a stay is granted. Thus, Mission Viejo's stay request on this matter fails to satisfy all three criteria and should be denied.

Revise Stormwater Ordinance, General Plan, and CEQA

Mission Viejo seeks a stay from the obligation to revise its storm water ordinance (Section F.2.b), General Plan (Section F.1.a), planning procedures and CEQA process (Section F.1.c) and contends the Regional Board lacks legal foundation for such requirements. The City's desire to stay these requirements pending a review of its petition is not justified because it has failed to satisfy all three criteria necessary for a request for stay of these requirements.

Consideration of the effects of new development and redevelopment on water quality during the project approval process helps ensure that potential water quality problems resulting from the project are identified and addressed before construction. The City has not produced proof or satisfactorily alleged facts that it will be substantially harmed by these actions during the petition review period. Demonstration of adequate legal authority for implementing the Federal NPDES regulations[6] is not new and was required by 40 CFR 122.26 (d)(2). Further, the second-term MS4 permit for Orange County, Order No. 96-03 (Section V. 10), also required a review of ordinances and demonstration by July 1997 of such legal authority. In addition, EPA (1992)[7] has found that the permittees must demonstrate that the General Plans are compatible with storm water regulations. Finally, this was a central requirement of the San Diego MS4 permit adopted by the SDRWQCB in 2001. Moreover, these requirements were addressed in the petitions to review that permit and upheld by the SWRCB in Order WQ 2001-15. As a result, Mission Viejo

[6] 40 CFR 122.26

[7] USEPA, 1992. Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems. EPA 833-B-92-002

could easily have anticipated that such requirements would be necessary upon adoption of a third-term MS4 permit, and its claims of harm are unjustified. Furthermore, the City has not raised a substantial question of law or fact for these issues. Finally, failing to revise these documents does risk substantial harm to the public interest via continued implementation of procedures that may have contributed directly or indirectly to exceedances of water quality standards and impairments of beneficial uses. Thus, Mission Viejo's stay request fails all three criteria and should be denied on this matter.

Receiving Water Limitations, Discharge Prohibitions, and Implementing the Iterative Process,

The City seeks a stay for the Discharge Prohibitions (Sections A.1 and A.2) and Receiving Water Limitations (Sections C.1 and C.3) of the permit, and also claims that implementing the iterative process to achieve compliance with receiving water limitations is a question of fact to be addressed by the SWRCB.

Following adoption of the second-term MS4 permit (Order No. 96-03), the SWRCB issued Order WQ 98-01 and Order WQ 99-05 that directed the Regional Boards to address Receiving Waters Limitations through an "iterative" process, which allows for receiving waters limitations to be achieved over time with BMPs. There is no dispute that the iterative process is appropriately included in the Orange County MS4 permit. These topics have been repeatedly and recently addressed by the SWRCB, however, and do not constitute substantial questions of law or fact. These requirements were derived from those adopted by the SDRWQCB under direction and guidance from the SWRCB in its precendential Orders WQ 98-01, WQ 99-05, WQ 2000-11 and WQ 2001-15. The Orange County MS4 permit was revised prior to adoption to fully conform with the SWRCB's most recent direction on these issues in Order WQ 2001-15[8]. Specifically, the permit was revised following the SWRCB direction to clarify that the reference to the iterative process for achieving compliance applies to the receiving water limitations and to the discharge prohibitions that require compliance with water quality standards (Section A.1 and A.2).

The only point of contention seems to be that the City could be exposed to liability if found to be out of compliance with the Discharge Prohibitions or Receiving Water Limitations. In other words, there is no "Safe Harbor" language. This approach is consistent, however, with the aforementioned SWRCB Orders and USEPA guidance cited in the Response to Comments Document.[9] While the SDRWQCB finds that cooperative responsive actions on the part of the discharger to address MS4 discharges that cause or contribute to violations of water quality standards are crucial in the assessment of enforcement options, less effective actions cannot be considered a shield from all enforcement in the event that water quality standards continue to be violated. If there is a lack of good faith effort on the part of the discharger to implement the iterative BMP process effectively, the SDRWQCB maintains that the potential threat of

[8] State Board Order No. 2001-15 reviewed Regional Board Order 2001-01, the San Diego County MS4 Permit. The Receiving Water Limitation Language was upheld with slight modifications. These modifications were then included in the third-term Orange County MS4 Permit, Regional Board Order R9-2002-01.

[9] Letters from Alexis Straus, Acting Director, Water Division, USEPA to Walt Pettit, Executive Director, State Water Resources Control Board, dated January 21, 1998 and March 17, 1998 (SWRCB/OCC File A-1041 for Orange County).

enforcement is a necessary incentive to help ensure timely and adequate action by the discharger. As such, the SDRWQCB believes the SWRCB should uphold the discretion of the regional boards by maintaining that the iterative BMP process is not a shield against all possible enforcement. This will provide regional boards with the capability necessary to protect the water quality of the state's receiving waters. As a result, a stay would risk substantial harm to the public interest if the City is not fully implementing the iterative BMP process to meet the discharge prohibitions and receiving water limitations. Thus, Mission Viejo's petition for a stay is flawed and should be denied.

Program Requirements that Would Otherwise Be Overturned by the SWRCB - Stay Request on These Items Lacks Substantial Questions of Law or Fact

The City of Mission Viejo also argues that if certain tasks be overturned by the SWRCB, it would cause significant confusion, unnecessary expenditure of resources, and exposure to liability for the City. Although the City is not requesting a stay of specific permit items under these terms, the City does raise them as substantial questions of law. Some of these issues overlap with permit requirements for which Mission Viejo does seek a stay and necessitates that the SDRWQCB address them in this written testimony. The City has not provided facts and proof of harm or substantial questions of law or fact for many of these disputed actions. Further, the City does not call for a stay of tasks related to these disputed actions, other than by general reference. For each, the City's argument is incomplete and should be dismissed. The SDRWQCB calls attention to several of these items to demonstrate the City does not risk substantial harm during the review period if a stay is not granted, and, rather, that a stay of these items would risk substantial harm to the public interest.

Requirements Regarding Peak Flows

Mission Viejo argues that the SWRCB may modify requirements regarding peak flow controls. In arguing for a review, the City states that the SDRWQCB lacks the authority to impose volume or flow rates on water being discharged from the MS4 into receiving waters. MS4 discharges with increased urban runoff peak flow rates and velocities resulting from new development and significant redevelopment are subject to regulation under the municipal storm water permits. This provision is included in the SUSMP criteria that has been upheld in SWRCB Orders WQ 2000-11 and Order WQ 2001-15.

Indeed, this approach follows SWRCB guidance. The SWRCB states in Order WQ 98-01 "to comply with CWA section 301, municipal storm water permits must include effluent limitations where necessary to meet […] water quality standards" (at pg. 4). In fact, the municipal storm water receiving water limitations language, as drafted by the SWRCB, requires MS4 discharges to be in compliance with water quality standards. Municipal storm water permits include requirements for the management of flow in order to protect receiving water beneficial uses and water quality objectives, as required under the federal NPDES storm water regulations.

In arguing for a stay, the City also does not exhibit proof of harm caused by this requirement, but speculates that preparing for tasks that could be overturned is generally harmful. The SUSMPs

are not to take effect until August 2004, by which time the SWRCB will have ruled on the Los Angeles permit. Thus, no liability exposure would result and no substantial harm to the City is supported, and any outdated information (i.e. confusion) within the City staff could easily be corrected with short correspondence. The request for a stay on this matter argument does not pass the test required by the California Code of Regulations and a stay of this requirement should not be granted.

It Is Appropriate For Municipal Storm Water Permits To Contain Requirements To Address Sanitary Sewer Overflows.

Municipal storm water permittees under federal law are required to effectively prohibit non storm water discharges, such as sanitary sewer overflows to their MS4s[10]. To that end, federal NPDES regulations 40 CFR 122.26(d)(2)(iv)(B)(4) provides that the Copermittee include in its proposed management program "a description of procedures to prevent, contain, and respond to spills that may discharge into the municipal separate storm sewer." Accordingly, the storm water permits issued by the SDRWQCB for San Diego and Orange Counties within the San Diego Region require the permittees to prevent, respond to, contain and cleanup all sewage and other spills that may discharge into their MS4s. The SDRWQCB MS4 permits rely heavily on pollution prevention measures, which is strongly supported by the USEPA.

Further, the County of Orange in its comments on Order No. R9-2002-0001 commented that "The County studies identify the source of coliform bacteria as urban runoff, wildlife, and sewer overflows… From the County's studies, it would appear that requiring urban runoff discharges to achieve water quality standards would reduce, but not necessarily eliminate the impairment of local waters for water contact recreational and aquatic habitat uses." Indeed, sanitary sewer overflows have been a very important factor in economically significant impacts to receiving water quality and beneficial uses of coastal waters. As owners or operators of MS4 systems that may act as conveyances for sanitary sewer overflows to receiving waters, the municipal permittees have a responsibility to take action themselves and to work with sewerage collection agencies to prevent and reduce to the maximum extent practicable pollutants in its discharges. This includes taking steps necessary to prevent, respond to, and mitigate the impact from overflows of wastewater from sanitary sewers. Because sanitary sewer overflows into the MS4 are a recognized source of impairment to beneficial uses, a stay of the requirement to address sewage spills pending review by the SWRCB, therefore, would risk substantial harm to the public interest as sewer overflows into the MS4 continue to impair receiving waters.

Whether Implementation of TMDLs Should Be Addressed When Permit Is Modified/Reissued *and* Requirements for Retail Gasoline Outlets

In these two items, the City again displays a substantial lack of contextual understanding of the requirements in the disputed permit. Regional Board Order No. R9-2002-01 refers to TMDLs in a Finding of Fact, but does not contain reference to them in any requirements. In addition, requirements for retail gasoline outlets were deleted from the Order prior to its adoption. As a result, these items have no relevance in a stay request and have not been supported sufficiently to

[10] CWA section 402(p)(3)(B).

meet the three criteria set forth in the California Code of Regulations necessary for a requested stay.

It Is Appropriate For Municipal Storm Water Permits To Contain A Detailed And Specific Framework Of Requirements For The Storm Water Quality Management Program.

As adopted by the Regional Boards, the municipal storm water permits represent the framework of minimum requirements to be implemented by the Permittees to achieve the Maximum Extent Practicable standard and ensure that urban runoff discharges do not cause or contribute to exceedances of water quality objectives. Within that framework, the Permittees have significant opportunity and flexibility to develop and implement effective programs and to improve and modify these programs as necessary to achieve and maintain compliance with the permits and receiving water quality objectives.

CWA section 402(p)(3)(B)(iii) provides that municipal storm water permits "shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." To meet this requirement of the CWA, the municipal storm water permit requires the implementation of BMPs, as required under Federal NPDES regulation 40 CFR 122.44(k). The permit specifies programs to be developed and implemented by the Copermittees in order to carry out the CWA requirements. Any specified programs in the permit are made all the more necessary by the exclusion of numerical effluent limits from the permit. Reliance on BMPs as opposed to numerical effluent limits requires specification of those programs that are relied upon to reduce pollution. Further, the USEPA supports the approach of increasingly detailed storm water permits, stating "The interim permitting approach uses best management practices (BMPs) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards" (USEPA, 1996)[11].

While the permit includes detailed requirements for widespread BMP implementation, it does not require use of any particular BMPs. The requirements contained in the permits are sufficiently broad and inclusive to provide the Permittees with a significant degree of latitude in developing and implementing programs. The municipal storm water permit approach in San Diego actually encourages implementation of combinations of BMPs, and does not preclude any particular BMPs or other means of compliance. Permits that allow for seemingly infinite means for achieving compliance do not specify the design or manner of compliance in violation of California Water Code section 13360.

Moreover, the Permittees are required to evaluate the effectiveness of their programs and to revise the programs as necessary to comply with the permits and receiving water quality objectives. The Regional Boards themselves must be able to evaluate the effectiveness of these programs. Without increasingly detailed permits that recognize that the complexity of storm

[11] U.S. Environmental Protection Agency 1996. Interim Permitting Approach for Water Quality Based Effluent Limitations in Storm Water Permits. 61 Federal Register 57425.

water management requires increasingly complex and integrative programs, the programs developed by the Permittees may not achieve the MEP standard identified by the Regional Boards or protect the beneficial uses of the receiving waters from the deleterious impact of polluted urban runoff discharges.

Allowance for Regional Solutions

Mission Viejo's disingenuous portrayal of the MS4 Permit in its petition fails to note that regional solutions are allowed as exhibited in section F.1.b.2.c of the permit as well as and the Fact Sheet (pp. 40-41) and Response to Comments Document (pp. 35, 61) . The SDRWQCB has followed the direction of the SWRCB in providing for regional storm water solutions. To allow more flexibility in BMP implementation, the permit's SUSMP requirements regarding structural treatment BMPs were drafted to allow BMPs to be shared by multiple new development projects on a "neighborhood" or "sub-watershed" level. While onsite BMPs provide many benefits, there may be cases where offsite structural BMPs, implemented on a "neighborhood" or "sub-watershed" basis, may be more feasible or effective. This is particularly the case for existing development, where opportunities for innovative site design do not exist.

Nonetheless, regional treatment facilities should be constructed and operated by the municipal storm water Permittees as a part of a larger program to protect receiving waters from pollutants contained in urban runoff discharges. Receiving waters should not be converted by the municipal storm water Permittees into "regional" treatment facilities. Such conversion does not protect the beneficial uses of those water bodies and may compromise the chemical, physical, and biological integrity of urban streams used to convey runoff to such facilities. It is the obligation of the Permittee to propose regional solutions that are in conformance with the Basin Plan and Receiving Water Quality Objectives. A stay of the permit provisions is not warranted in this matter because during the review period and afterward, the City will be able to propose and implement regional BMP solutions that conform to the Basin Plan and do not violate Water Quality Objectives without sustaining substantial harm. Furthermore, the City has failed to exhibit a lack of harm to interested persons or the public interest if a stay is granted and it has failed to establish that a substantial question of law or fact exists regarding this matter.

Response to the Golden Rain Foundation

In contrast to the petitions of the City of Aliso Viejo and the City of Mission Viejo, which argued specific permit requirements, the Golden Rain Foundation argues that a stay is required of this permit for the City of Laguna Woods because the Foundation's members will be overly burdened by being subject to two separate MS4 permits and will sustain harm resulting from the costs associated with that issue. The Golden Rain Foundation represents citizens of the City of Laguna Woods, which, like the County of Orange and the City of Lake Forest, straddles the San Diego and Santa Ana Regional Boards.

Apart from objecting to regulation under different permits with different administrative and procedural requirements, the Foundation does not identify specific substantial questions of law.

The Foundation also does not contest the permit findings discussed above. The claim of substantial harm is predicated upon an alleged burden that members of the community will not be subject to equal storm water requirements through the City and that they will be subject to increased taxes. However, the Foundation fails to acknowledge that cities and counties routinely establish differential zoning requirements and other land-use restrictions that affect property owners' ability to develop, prohibit certain actions, or otherwise authorize or limit the ability of citizens to engage in certain activities in those areas.

The Foundation does not acknowledge that this argument was addressed in the Fact Sheet, Response to Comments document, and by Regional Board Members during the hearing and subsequent deliberation prior to adopting the permit. The Foundation has not considered the practicality of establishing uniform codes and ordinances throughout the city that satisfies the more stringent requirements of the two permits and obviates the need for the different regulatory programs cited by the Foundation. In fact, this is the method being pursued by the Principal Permittee, the County of Orange, under this permit. Instead, and without documentation from the City of Laguna Woods, the Foundation has erroneously assumed the manner of compliance and that it will be harmed by increased taxes or wasted public funds. They have not produced facts of substantial harm should the stay not be granted during the petition review period.

Further, the Foundation argues that because previous MS4 permits from both Regional Boards were similar, but now differ, it should be free to select which permit to follow. As noted in the administrative record, the SDRWQCB is not prevented nor precluded from issuing new or different permit requirements than previously. Apparently the Foundation, which is not a Copermittee, would prefer to comply solely with the Santa Ana Regional Board's third-term permit, even though most of the area of the City of Laguna Woods (and Leisure World) drains to Aliso Creek in the San Diego Region and the City is a Copermittee currently subject to an enforcement action on Aliso Creek. The Foundation argues that the previous permitting approach (similar permits) is fully protective of water quality, and fails to mention the water quality degradation to Aliso Creek (and San Diego Creek in the Santa Ana region to which it also discharges) currently resulting from the discharges of its members. For all the foregoing reasons the Foundation fails to meet any of the three criteria for a stay and its petition for a stay should be denied.

CONCLUSION

Collectively and individually, the stay requests lack merit and fail to satisfy the three criteria identified by the SWRCB. Specifically, a stay would result in substantial harm to other interested persons and the public interest because the water quality conditions resulting from storm water and urban runoff pose an immediate threat to the environment and public health. In addition, the Stay Proponents' arguments that substantial harm would result to them or the public interest if a stay is granted fails because many of the disputed items were broadly required in the previous second-term permit and DAMP and could have been foreseen or have simply been misinterpreted by the Stay Proponents. Moreover, the San Diego Copermittees, acting under essentially the same requirements have exhibited that compliance is fiscally and practicably

achievable. Finally, the Stay Proponents fail to raise substantial questions of law or fact, and instead raise several issues which have previously been addressed by the SWRCB or are within the broad legal authority of the Clean Water Act section 402(p)(3)(B)(iii), which allows the Regional Board to identify measures and controls to reduce pollutants to the maximum extent practicable. For all the reasons described herein, the SDRWQCB strongly recommends that the SWRCB deny the stay requests.